

## **MEMORANDUM**

**SUBJECT:** Response to Substantive Comments on Proposed Changes to EPA's Policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 64 FR 26,745 (May 17, 1999)

**TO:** Interested Parties

**FROM:** Steven A. Herman /s/  
Assistant Administrator, OECA

On December 22, 1995, EPA issued its policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention," commonly known as the "Audit Policy" (60 FR 66,706). The Audit Policy provides incentives in the form of penalty waivers and reductions for regulated entities that voluntarily discover, promptly disclose and expeditiously correct violations of Federal environmental requirements.

When the Audit Policy was first released, EPA committed to undertake an evaluation of the Policy's effectiveness after three years. On May 17, 1999, EPA published the preliminary results of that evaluation together with proposed revisions to the Policy. (64 FR 26,745). During a sixty-day comment period that followed, the Agency received written comments from twenty-nine interested parties. Commenters included industry representatives, trade associations, public interest organizations, law firms and individuals. The comments as a whole were well-reasoned, articulate, and insightful. The Agency carefully reviewed and considered all of the comments, and many of the suggestions made therein are being incorporated into the final revisions to the Audit Policy.

The attached document responds to the substantive comments received. Where multiple commenters raised the same or similar issues, comments were consolidated and addressed as a whole for the sake of efficiency. Copies of this document are being provided to all commenters. The document is also being made publicly available through the Enforcement and Compliance Document and Information Center (telephone 202-564-2614) and on the Internet at [www.epa.gov/oeca/ore/apolguid.html](http://www.epa.gov/oeca/ore/apolguid.html).

Attachment: "Response to Comments"

**EPA's Response to Substantive Comments on Proposed Changes to EPA's Policy on  
"Incentives for Self-Policing:  
Discovery, Disclosure, Correction and Prevention of Violations"  
64 FR 26,745 (May 17, 1999)**

This document responds to the most significant comments submitted on EPA's preliminary evaluation of and proposed changes to its Audit Policy. The evaluation and proposed changes were published at 64 *Federal Register* 26,745 on May 17, 1999, and the comment period lasted for 60 days.

*Background*

EPA issued its Audit Policy at 60 *Federal Register* 66,706 on December 22, 1995. Formally titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," the Audit Policy provides incentives for regulated entities who voluntarily discover, promptly disclose and expeditiously correct violations of Federal environmental law and regulation. When the Audit Policy was first issued, the Agency committed to undertake an evaluation of the Policy's effectiveness during its first three years. On May 17, 1999, EPA issued the preliminary results of this evaluation together with proposed changes to the Policy in 12 areas. During the 60 day comment period that ensued, EPA received 29 comment letters from businesses, trade associations, public interest groups, law firms and individuals. Many of the comment letters discussed not only the proposed changes but also suggested changes in additional areas. In deciding whether and how to finalize the proposed changes, EPA carefully considered all of these comments, EPA's own experience implementing the Policy, and input received from other stakeholders throughout the evaluation process. Copies of the 29 comment letters are available from EPA's Enforcement and Compliance Docket and Information Center (telephone 202-564-2614 or 202-564-2119; email [doCKET.oeca@epa.gov](mailto:doCKET.oeca@epa.gov); Internet site [www.epa.gov/oeca/polguid/enfdock.html](http://www.epa.gov/oeca/polguid/enfdock.html).) The revised Audit Policy will also be available through the Information Center.

**A. RESPONSES TO EPA'S TWELVE PROPOSED REVISIONS TO THE AUDIT POLICY**

**1. Prompt Disclosure Period**

*a. Length of the prompt disclosure period.*

Twenty-four of the 29 comments discussed EPA's proposal to lengthen the prompt disclosure period. The prompt disclosure period under the 1995 Audit Policy is 10 days. Twenty-one commenters favored lengthening the disclosure period to at least 21 days, while three commenters opposed lengthening it. Many of those in favor of establishing a longer disclosure period pointed out that larger companies have a difficult time examining a factual issue,

determining whether a violation has occurred and obtaining a management decision whether to disclose – all within ten days. Those who objected to lengthening the period suggested that there is no factual basis for doing so and indicated that EPA should retain its discretion to accept late disclosures on a case-by-case basis instead of granting a blanket extension.

EPA has decided to lengthen the prompt disclosure period as proposed from 10 to 21 days. In addition, EPA will retain its discretion to accept later disclosures in the exceptional case, when multiple facilities are involved, and in the acquisitions context.

According to actual and potential Audit Policy users, the 10-day prompt disclosure period presents an impediment to using the Policy. In a Fall 1998 survey of Audit Policy users (hereafter referred to as the “User’s Survey”), the most frequently suggested change (18%) was to lengthen the prompt disclosure period.

During the first three years the Policy was in effect, some entities had trouble meeting the 10-day disclosure period. Out of the first 274 disclosures received, 53 (or 19 %) were late. Approximately half of these late disclosures met all the conditions of the Policy except for the 10-day disclosure period.

Lengthening the disclosure period will provide organizations with additional time to analyze discoveries of potential violations and to decide whether to make a disclosure under the Policy. Since the revised Policy provides that the prompt disclosure period begins the moment any officer, director, employee or agent of the facility has an objectively reasonable basis to conclude that a violation has or may have occurred, lengthening the disclosure period provides management with additional time in which to assess the situation and to decide to disclose. In particular, larger organizations with multiple layers of management may require more time to reach such decisions.

In deciding how long to make the prompt disclosure period, EPA evaluated how late, on average, late disclosures were being submitted. During the first three years the Policy was in effect, approximately 58% of late disclosures were made between 10 and 20 days after discovery. EPA selected 21 calendar days as the appropriate disclosure period because 21 days will capture all of these late disclosures and because 21 is a multiple of seven, so that if a discovery is made on a business day, the disclosure deadline will likely also fall on a business day. Under the revised Policy, when the deadline falls on a weekend or Federal holiday, the cutoff date will be advanced to the next business day.

A few commenters suggested that the disclosure period should be more than 21 days. EPA feels that a 21-day disclosure period -- more than double the 10-day period under the 1995 Audit Policy -- will provide ample time for most entities while still ensuring that the Agency receives notice of violations promptly. The Policy also provides the Agency with the discretion to accept

later disclosures in the exceptional case (such as where there are complex circumstances surrounding the discovery), in the multi-facility context (where EPA and the entity agree in advance on the timing and scope of the audit and the facilities to be audited are identified in advance) and in the acquisitions context.

In general, this 21-day disclosure period applies to all potential users, with the exception of violations that by law must be reported in a shorter amount of time. One commenter suggested that organizations should always be given at least 21 days in which to make a disclosure, regardless of any law that might require otherwise. Where a law requires reporting to EPA within a shorter period -- for example, the immediate reporting requirements in 42 U.S.C. § 9603 -- the Agency does not intend for the Policy to supercede the statutory requirement.

*b. EPA's discretion to accept late disclosures*

Ten commenters suggested that EPA should retain its flexibility to extend the prompt disclosure period to allow later disclosures in some instances. The explanatory text of the 1995 Policy provides, "Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status." The proposed revisions had deleted this language and replaced it with the following: "EPA may extend the disclosure period to allow reasonable time for completion and review of multi-facility audits where (a) EPA and the entity agree on the timing and scope of the audit prior to its commencement; and (b) the facilities to be audited are identified in advance." Many commenters noted that this replacement language would have applied to multi-facility audits only and suggested that EPA should, instead, retain its flexibility on late disclosures that do not arise out of the multi-facility context.

EPA agrees that the Agency should retain its discretion to accept late disclosures when multiple facilities are not involved. However, the explanatory text in section I.E.3 of the revised Policy cautions would-be users that it is in their best interest to meet the 21-day deadline. Doing so provides assurance that disclosures will be considered timely, as long as reporting within a shorter period of time is not required by law. However, the text also notes that EPA retains its flexibility to accept late disclosures under some circumstances. If the 21-day period has not yet elapsed but the organization suspects that it will be unable to meet the deadline, the organization should contact EPA to discuss disclosure options. Organizations that are planning multi-facility audits and those that are involved in acquisitions should also contact the Agency in advance to discuss options for an extended disclosure period. If an organization has already missed the 21-day deadline and has failed to contact EPA in advance of the deadline, it may still be eligible for Audit Policy credit if it can demonstrate that it has an "exceptional case," such as where there are complex circumstances, including where EPA determines that the violation could not be

identified and disclosed within 21 calendar days after discovery.

c. *Trigger for the beginning of the prompt disclosure period*

Seventeen commenters remarked on the trigger for the prompt disclosure period (i.e., the event that starts the 21-day clock ticking). The explanatory text in the revised Policy at I.E.3 states, “The 21-day disclosure period begins when the entity discovers that a violation has, or may have, occurred. The trigger for discovery is when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. The ‘objectively reasonable basis’ standard is measured against what a prudent person, having the same information as was available to the individual in question, would have believed. It is not measured against what the individual in question thought was reasonable at the time the situation was encountered. If an entity has some doubt as to the existence of a violation, the recommended course is for the entity to proceed with the disclosure and allow the regulatory authorities to make a definitive determination. Contract personnel who provide on-site services at the facility may be treated as employees or agents for purposes of the Policy.”

Several commenters objected to the use of “may have occurred” and “objectively reasonable basis,” suggesting that the disclosure period should begin only when a violation has actually or apparently occurred and where the entity has actual knowledge of its occurrence. The revised Policy retains this language because the Agency encourages disclosures even in the face of factual complexity or legal uncertainty. In order to protect human health and the environment, the Agency is interested in receiving disclosures as quickly as feasible. Thus, entities should not delay making a disclosure in order to determine definitively whether a violation has occurred. If the Agency determines that no violation has occurred, no penalty will be assessed, regardless whether the terms and conditions of the Audit Policy have been met.

Other respondents commented on the category of persons -- “any officer, director, employee or agent of the facility” -- who can make a discovery. Ten commenters stated that this list is too broad, arguing that discovery by “any employee” and/or “agent” should not trigger the prompt disclosure period. Instead, some commenters noted, discovery should not be deemed to have occurred until a supervisor or other higher-ranking employee becomes aware of the violation. EPA disagrees with the contention that the discovery should have to be by a high-level employee. Regulated entities should take steps to ensure that all employees and agents are trained in preventing, recognizing and responding to violations, including reporting the violation to management. EPA believes that entities should ensure that lower-level employees are trained to elevate compliance problems promptly. In addition, users should be aware that the revised Policy significantly lengthens the disclosure period from 10 to 21 days. This longer disclosure period provides sufficient time for violations to be brought to the attention of those personnel within the facility who have the authority to make disclosures under the Audit Policy.

One commenter suggested implementing an optional pre-registration system whereby a regulated entity would pre-designate an internal decision-maker for purposes of discovery. EPA has considered but rejected this proposal because it could undermine information-sharing within the entity. For example, employees could subvert the system by deliberately withholding information from the pre-designated decision-maker as a way of avoiding or delaying the disclosure period trigger.

Finally, one commenter suggested that entities be required to disclose all releases into the environment, not just those that result in violations. The Audit Policy provides incentives for entities that voluntarily discover, promptly report and expeditiously correct violations. The incentives consist of civil penalty mitigation and, on the criminal side, the disclosing entity's eligibility for no recommendation for criminal prosecution. EPA believes the incentives offered under the Audit Policy are best focused on prompt disclosure and correction of violations of the law, and that broadening the scope of the Audit Policy as suggested could be detrimental.

## **2. Independent Discovery**

### *a. Availability of the Audit Policy where EPA is planning an investigation, inspection or information request.*

The purpose of the Audit Policy is to promote compliance with environmental laws and requirements by encouraging entities to self-police, including implementing voluntary auditing programs and/or compliance management systems. Under the terms of the Audit Policy's independent discovery condition, a regulated entity must discover and disclose potential violations independent of government or third-party action. That is, discoveries and disclosures must be made at the entity's own initiative and not in response to belief or knowledge that the facility in question is already or is about to become the subject of administrative, civil or judicial action.

In order to clarify that the independent discovery condition does not preclude penalty relief in the multi-facility context, the revisions that were proposed in the May 1999 *Federal Register* notice stipulated that the impending investigation, inspection or information request must involve the same facility in order to fall under the independent discovery condition. While many agreed in principle with the change, a number of commenters felt that the proposal was vague or unclear. The proposal also included the following provision: "Where, as a result of violations uncovered during an inspection, investigation, or information request at a facility, EPA is planning to inspect, investigate, or send an information request to other facilities of the same regulated entity, such facilities will not qualify for audit policy credit because any violations disclosed thereafter would not be 'independent' of government action." Eleven commenters objected to disqualifying disclosures where EPA is merely planning an investigation, inspection or information request.

In reviewing the intended purpose of revising the independent discovery language and the comments that EPA received in response to the proposed revisions, the Agency has determined that the best course of action is to retain the independent discovery language contained in the 1995 Policy while adding two additional provisions (in the 2000 revised Policy, language in subsections II.D.4.a.i and II.D.4.b) to address good faith disclosures and the multi-facility context.

Revised section II.D.4.a.i provides that a discovery will not be considered independent where the entity discovers a violation after “the commencement of a Federal, State or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity (*where EPA determines that the facility did not know that it was under civil investigation, and EPA determines that the entity is otherwise acting in good faith, the Agency may exercise its discretion to reduce or waive civil penalties in accordance with this Policy*).” The italicized language is new and applies in the civil context only. EPA added this language because the Agency recognizes that in some cases an entity may make a disclosure in good faith without being aware that it is already the subject of a civil investigation. Depending on the circumstances of the case, EPA may, in its discretion, decide to apply the terms of the Audit Policy even though an investigation had already commenced.

Section II.D.4.b of the Revised Policy is also new. It states, “For entities that own or operate multiple facilities, the fact that one facility is already the subject of an investigation, inspection, information request or third-party complaint does not preclude the Agency from exercising its discretion to make the Audit Policy available for violations self-discovered at other facilities owned or operated by the same regulated entity.” This new language explicitly recognizes that a multi-facility entity may receive penalty mitigation under the Audit Policy even where one of its facilities is already the subject of an enforcement action. However, the explanatory text at I.E.4 cautions entities that own or operate multiple facilities not to wait until EPA has discovered violations at one of its facilities before taking action to detect and disclose violations at other facilities.

*b. Scope of the independent discovery condition.*

Three respondents commented that the independent discovery condition should not preclude availability of the Audit Policy if the previous or pending investigation / inspection / information request did not directly relate to the violation being disclosed. EPA's implementation of the Policy has been consistent with this suggestion. In general, the independent discovery condition precludes penalty mitigation only for disclosures of violations that fall within the scope of the previous or pending investigation / inspection / information request or third party complaint. For example, an inspection limited in scope to Clean Air Act requirements might preclude availability of the Audit Policy for Clean Air Act violations but not for Clean Water Act violations.

*c. Possibility of chronic bad actors receiving Audit Policy credit.*

Two commenters expressed concern that limiting the independent discovery condition to the same facility in the case of multiple facilities owned or operated by the same regulated entity could allow chronic bad actors to take advantage of the Audit Policy. Specifically, these commenters expressed concern about companies with poor track records on environmental compliance matters and questioned how the EPA will be able to prevent them from receiving Audit Policy credit if the independent discovery language is revised as proposed.

In applying the Audit Policy, EPA always examines the circumstances surrounding each particular disclosure. The repeat violations condition (II.D.7) precludes penalty mitigation under the Audit Policy where the same or a closely related violation has occurred at the same facility within the past three years or is part of a pattern of violations at multiple facilities within the past five years. If there is no such pattern, EPA may, depending on the circumstances of the case, provide penalty mitigation for companies that discover their own recurring violations.

**3. Availability of “no recommendation for criminal prosecution” for entities that meet all of the conditions except for systematic discovery**

*a. Types of discoveries that are non-systematic*

One commenter asked for additional guidance on what types of discoveries are non-systematic.

The Audit Policy provides that “systematic” discoveries are those that are discovered through either an environmental audit or a compliance management system. Both of these terms are defined in section II.B. Any type of discovery that falls outside of one of these two mechanisms would not qualify as systematic. Where violations are systematically discovered, entities are eligible for 100% mitigation of gravity-based penalties. Where violations are not systematically discovered, entities are eligible for 75% mitigation of gravity-based penalties. In addition, violations do not have to be systematically discovered in order for an entity to be eligible for no recommendation for criminal prosecution.

EPA encourages prompt disclosure of potential criminal violations no matter how they are discovered, and credit under the Audit Policy is available as long as the other conditions of the Policy are met, including appropriate efforts to prevent recurrence of the violation. Evidence of potential criminal misconduct can come from many different sources and processes. In the course of investigating environmental crimes, EPA does not, and does not want to, get into the business of evaluating how systematic these processes were as long as the other conditions of the Policy are satisfied.

*b. Gravity-based penalties for companies that meet all requirements except for “systematic discovery.”*

One commenter asked for guidance as to whether EPA will seek gravity-based penalties when violations are not systematically discovered.

The 2000 Audit Policy retains the same incentive for such violations that was available under the 1995 Policy -- 75% mitigation of gravity-based penalties, as long as the Policy's other conditions are met.

*c. Application of the Policy by the U.S. Department of Justice*

One commenter asked for clarification on whether the U.S. Department of Justice (DOJ) will abide by the EPA Audit Policy.

EPA consulted closely with DOJ in developing both the 1995 Audit Policy and the revised 2000 Audit Policy. In general, the Audit Policy applies to decisions made by the EPA. (Full details on applicability are set forth in section II.G of the Audit Policy.) Where a disclosure under the Audit Policy results in a referral to DOJ, the two Agencies regularly consult regarding the applicability of the Audit Policy. EPA has worked cooperatively with DOJ on a number of cases involving Audit Policy disclosures, and DOJ relies on the Audit Policy as a factor in determining whether and how to prosecute cases.

*d. Effect of this revision on the audit requirement of the Policy –*

Three commenters oppose making the “no recommendation for criminal prosecution” incentive available for entities that have not systematically discovered their violations.

In the civil context, EPA has constructed a two-tiered approach to penalty mitigation under the Audit Policy. For entities that meet all of the terms and conditions of the Audit Policy, including systematic discovery, EPA will eliminate gravity-based penalties. For entities that meet all of the terms and conditions of the Policy except for systematic discovery, EPA will reduce gravity-based penalties by 75%, assuming the discovery was made in good faith.

On the criminal side, EPA has no parallel ability to provide graduated penalty mitigation. The U.S. Department of Justice and other prosecuting agencies retain full prosecutorial discretion in criminal cases, so the only incentive that EPA can offer for disclosures of criminal violations is to not recommend criminal prosecution. Because EPA has no ability to establish graduated incentives for disclosures of criminal violations, the Agency has decided to make the incentive available for all good-faith disclosures, regardless of whether the violation was discovered systematically, as long as all other terms and conditions of the Policy are satisfied. Over the four

years since the Audit Policy has been in effect, EPA's practice has been not to require systematic discovery in the criminal context. Thus, the change made to the 2000 Audit Policy in this area merely conforms the Policy text to actual Agency practice.

#### **4. Clarify what level of cooperation is required**

##### *a. Copies of audit reports.*

Thirteen respondents commented on the extent to which audit reports should be requested under the Audit Policy. Of these, twelve suggested that the Agency should either never request audit reports or else request audit reports only under limited circumstances. One suggested that audit reports should not be privileged.

The 1999 proposed revisions would have expanded the explanatory text section on cooperation by adding a provision on the type of cooperation expected in a criminal investigation, stating, "[f]ull cooperation does not necessarily require that the entity waive all legal privileges available to it, but does require that the disclosing entity provide EPA with all information relevant to the violation(s) disclosed, whether or not such information might otherwise be protected by legal privilege." Because several commenters found this last statement confusing, it has been dropped from the 2000 Policy.

The 2000 Policy notes that the Agency must have sufficient information to determine whether the terms and conditions of the Audit Policy have been met for each disclosure. Cooperation requires disclosing entities to provide the Agency with this information. In most cases, as evidenced by EPA's practice, the entity need not supply a copy of the audit report in order to fulfill the cooperation requirement. However, if EPA is unable to obtain the information it needs through other means, it may in rare instances request that a copy of the audit report be provided. The Policy stipulates that when a Regional office requests a copy of the audit report, that Region shall notify EPA Headquarters. This notification requirement will allow Headquarters to keep track of instances in which audit reports have been requested.

Regarding privilege, EPA opposes establishing a privilege for environmental audit reports.

##### *b. Access to all employees*

Two commenters stated that cooperation should not require that the disclosing entity grant investigators access to all of its employees. One of these commenters stated that access should be granted only to employees who have a nexus to the violation in question.

The 2000 Audit Policy states that access to all employees is necessary for criminal disclosures. Depending on the size and nature of the disclosing entity, it is unlikely that a criminal

investigator would need to speak with all employees at a facility. However, the investigator must be granted access to all employees for the sake of efficiency and also to avoid unduly limiting the scope of the investigation.

- c. *Internal process to assure consistency with stated policy of not routinely requesting audit reports*

One commenter suggested that EPA establish an internal policy to ensure that all Agency offices comply with the Agency's policy of not routinely requesting audit reports.

EPA agrees with this suggestion and has added a requirement that Regional offices notify Headquarters whenever they request an audit report in connection with an Audit Policy disclosure case.

**5. Clarify that penalty relief is available under other enforcement policies for “good faith” disclosures of violations, even for those that do not meet the terms of the Audit Policy criteria**

Two commenters suggested that EPA should not have multiple enforcement policies but should instead have just one policy.

Because EPA is charged with enforcing multiple environmental laws in a variety of media, it would be impractical for the Office of Enforcement and Compliance Assurance to have just one enforcement policy. The Audit Policy is a voluntary settlement policy that provides an incentive-based approach. As such, its terms and conditions differ from those found in traditional enforcement policies. In general, the Audit Policy is available for disclosures of all types of environmental violations, with the exception of repeat violations, those that have resulted in serious actual harm or may have presented an imminent and substantial endangerment to human health or the environment, and those that violate the specific terms of any judicial or administrative order or consent agreement. However, other media-specific enforcement policies that are consistent with the Audit Policy are not preempted by it.

The 2000 Audit Policy clarifies that where an entity has failed to meet the terms and conditions of the Audit Policy, it may still be eligible for penalty reductions under other EPA media-specific enforcement policies where good faith is evident. This language responds to the concern expressed by several commenters that regulated entities may not be aware that penalty relief for good faith disclosures is also available under media-specific policies.

**6. Clarify EPA's intent concerning the “imminent and substantial endangerment” exclusion**

*a. Scope of the serious actual harm / imminent and substantial endangerment exclusion*

Seven commenters suggested that the serious risk of harm / imminent and substantial endangerment condition should be revised. Of these, three thought that violations that have the potential to cause harm but do not actually cause harm should be eligible, two thought that the condition should not apply in the acquisitions context when there is no longer an imminent and substantial endangerment, and two suggested that penalty relief should not be available for any violation or release that could cause harm.

The 2000 Audit Policy has retained the 1995 Policy's exclusion of penalty mitigation for violations that actually resulted in serious harm to human health or the environment and for violations that may have presented an imminent and substantial endangerment to human health or the environment. Thus, as suggested by the commenters, violations that have the potential to cause harm – but do not actually cause harm – are eligible as long as they did not present an imminent and substantial endangerment.

Because the Policy is not intended to provide penalty relief for serious violations that cause serious harm or present an imminent and substantial endangerment, such violations are ineligible regardless whether they occurred prior to acquisition. However, as noted in section II.G.2, an entity that has failed to meet the conditions of the Audit Policy due to an imminent and substantial endangerment may nevertheless be eligible for penalty relief for a disclosure under a media-specific enforcement policy.

EPA disagrees that disclosure of violations and releases that could cause harm should be excluded from Audit Policy credit. The explanatory text at I.E.8 notes that not all violations that involve releases are ineligible under the Audit Policy. Excluding all releases that could cause harm would in effect eliminate all releases from Audit Policy eligibility, as any release could potentially cause harm, even if the risk is a remote one. EPA has chosen to retain the language on serious actual harm and imminent and substantial endangerment because it strikes the right balance. The language excludes the most serious violations from eligibility for Audit Policy credit while allowing penalty mitigation for those releases that pose less of a risk to human health or the environment.

*b. Prevention of occurrences of serious actual harm / imminent and substantial endangerment*

The 1999 proposed revisions included the following statement, “This condition [serious actual harm / imminent and substantial endangerment] does not bar a company from qualifying for relief under the Audit Policy solely because the violation involves release of a pollutant to the environment; rather, it is intended to exclude those violations that present a serious risk of harm since good audit programs should prevent such occurrences.” Three commenters objected to the

assertion that good audit programs should prevent serious harm, pointing out that malfunctions, accidents and operator error that result in serious harm can occur despite solid auditing programs and compliance management systems.

While EPA agrees that auditing programs and compliance management systems cannot entirely prevent serious violations, they should reduce the risk that such serious violations will occur. Nevertheless, because this statement could be misinterpreted by some readers, EPA has not included it in the 2000 Audit Policy.

**7. Nomenclature change from “due diligence” to “compliance management system”**

*a. Retaining due diligence concept*

Four commenters stated that the concept of due diligence in systematic discoveries should be retained.

EPA agrees. While the 2000 Audit Policy substitutes the term “compliance management system” for “due diligence” in II.B (definitions) and II.D.1 (the systematic discovery condition), the change is intended to be one of nomenclature only. The criteria for a compliance management system are identical to the criteria that were included for due diligence under the 1995 Policy. The rationale for the nomenclature change is that “compliance management system” is much more commonly used in the regulated community than is “due diligence” to refer to a systematic management effort to achieve and maintain environmental compliance.

*b. Definition of compliance management system*

One commenter objected to the definition of compliance management system contained in section II.D. The commenter stated that requiring all six of the listed conditions would hinder the flexibility of an entity to adopt a compliance management system that is appropriate for the facility.

The six elements provide potential users of the Audit Policy with guidance as to what will be expected of a compliance management system in order to qualify for penalty mitigation. EPA believes that all six of the listed elements are necessary for the system to adequately ensure that the facility will achieve and maintain compliance. EPA does recognize that each facility has its own unique operational constraints and compliance issues. For this reason, the definition of compliance management system explicitly notes that each entity's system should be “appropriate to the size and nature of its business.”

*c. “Environmental management system” vs. “compliance management system”*

One commenter suggested that the nomenclature change should be to “environmental management system,” not “compliance management system.” Another commenter suggested that any independent discovery by an entity with a documented environmental management system in place at the time of discovery should qualify.

EPA considered, but rejected, changing “due diligence” to “environmental management system.” Because there is no singular definition for “environmental management system” and it is entirely possible to construct an environmental management system that does not address compliance with environmental laws and regulations, the Agency selected “compliance management system” as the better term.

*d. Development of appropriate operational procedures subsequent to discovery*

One commenter stated that any independent discovery should qualify under the Audit Policy if the entity develops appropriate operational procedures as part of its efforts to remedy the violation.

Under the Audit Policy, 100% mitigation of civil penalties is available for violations that were discovered systematically, including for violations that were detected during the initial audit of a routine audit plan. Violations that were discovered by other-than systematic means are eligible for lesser penalty mitigation at the rate of 75%. The Agency reserves full penalty mitigation for entities that undertake systematic efforts to detect potential violations because such efforts are at the heart of self-policing.

If the Audit Policy were to provide 100% penalty mitigation for all violations, regardless of how discovered, it would undermine the Agency’s efforts to encourage self-policing at an early stage.

*e. Discovery by small businesses*

One commenter suggested that small businesses should be eligible for Audit Policy credit even without an audit program or compliance management system in place.

EPA agrees that small businesses have special needs and, in general, have fewer resources available to them than larger companies. EPA’s Small Business Policy is available to companies with 100 or fewer employees. The Small Business Policy provides penalty mitigation for small businesses that make a good faith effort to comply with environmental requirements by discovering violations and making prompt disclosures and corrections. The Small Business Policy does not require systematic discovery in order to qualify for penalty waiver. Concurrent with the process of revising the Audit Policy, EPA is also revising its Small Business Policy. The Agency is planning to publish the two revised policies in the *Federal Register* contemporaneously. The revised Small Business Policy will also be available on the Internet at

[www.epa.gov/oeca/polguid/polguid1.html](http://www.epa.gov/oeca/polguid/polguid1.html).

*f. Environmental management system software programs*

One commenter suggested that the Audit Policy should be available for entities that discover violations through environmental management system software programs.

Where the software program is part of an overall compliance management system that meets the definition in the Audit Policy, and all of the Policy's conditions are met, disclosures will be eligible for 100% penalty mitigation.

*g. Superior environmental practices*

Two respondents commented that the Audit Policy should be available only to entities that demonstrate "superior" environmental practices and suggested that the definition of compliance management system should be tightened to reflect superior practices.

While EPA applauds superior performers, the Agency does not require overall superior environmental performance in order to qualify for the Audit Policy. The Policy encourages all entities to implement systematic self-policing efforts. EPA believes that such efforts will contribute to improved performance. If the Audit Policy were available only to those entities that are already performing at superior levels, the Agency would miss out on the opportunity to provide an incentive to average and lower-than-average performers to improve their overall compliance by undertaking more rigorous self-policing efforts. In addition, entities with superior environmental practices may not need to take advantage of the Policy because they may be less likely to encounter violations.

*h. Audit categories*

One commenter suggested that EPA revise the systematic discovery requirement by eliminating any references to compliance management systems and making the Audit Policy available only for narrowly defined audit categories. The commenter suggested that such audits could focus on audits designed to (a) identify pollution prevention opportunities, (b) address one or more issues of concern to local citizens, or (c) review general compliance matters, provided the audit is externally verified with EPA-established standards for comprehensive auditing.

EPA has considered this proposal but has several concerns about it. First, by prescribing the types of audits that could qualify, the proposal would discourage innovation. Second, by limiting incentives to audits that fall within one of these three categories, the proposal could fail to encourage the type of broad self-policing that the Audit Policy intends to encourage. Third, by requiring EPA to externally verify audits, the proposal would require significant Agency

resources for implementation. The field of environmental auditing and compliance management systems is still relatively new. To date, the Policy has been effective at encouraging companies and other regulated entities to voluntarily undertake various forms of self-policing. Rather than narrowly prescribing the types of audits that would be available for Audit Policy credit, the Agency prefers to encourage entities to undertake auditing across the board.

## **8. Describe the EPA Processes for Handling Civil and Criminal Disclosures**

### *a. Disclosures to states*

One commenter suggested that EPA should indicate that it will defer to State action following disclosure to State agencies of violations in a Federal program that the State is approved or authorized to administer.

The revised Audit Policy clarifies that EPA will defer to States that have audit policies that meet minimum requirements for Federal delegation. Section I.G. (Effect on States) provides, "...for States that have adopted their own audit policies in Federally-authorized, approved, or delegated programs, EPA will generally defer to State penalty mitigation for self-disclosures as long as the State policy meets minimum requirements for Federal delegation."

### *b. Appropriate Federal review bodies should include at least one public or community-level representative.*

Three commenters suggested that appropriate Federal review bodies should include at least one public or community-level representative.

EPA greatly values public participation and has sought the views of members of the public and public interest groups throughout the evaluation process that culminated in revisions to the Audit Policy. Such public participation is an appropriate means of ensuring that the Audit Policy adequately protects the public interest. Regarding individual disclosures, because EPA treats disclosure cases as open enforcement matters, the Agency's policy is to treat information received under the Audit Policy as confidential until settlement is reached. (See Memorandum from Steven A. Herman entitled, "Confidentiality of Information Received Under Agency's Self-Disclosure Policy," January 16, 1997, available on the Internet at [www.epa.gov/oeca/sahmemo.html](http://www.epa.gov/oeca/sahmemo.html).)

## **9. Clarify that EPA will release case information upon case settlement unless a claim of confidential business information is made, another Freedom of Information Act exemption applies, or any other law would preclude such release**

A number of respondents commented on EPA's proposal to clarify that the Agency will release

case information upon settlement unless there is a valid reason for withholding it, such as a claim of confidential business information, a Freedom of Information Act exemption, or another law that would preclude release. Views in this area were mixed, with seven commenters stating that EPA should limit the amount of information it releases and three stating that EPA should broaden and expedite its releases of information to the public. Two commenters requested that the Policy clearly state that information regarding disclosures may be released to the public.

EPA supports the public's right to know about environmental violations and the Agency's response to violations. Recognizing that these are open enforcement cases, however, the Agency generally does not release information related to disclosures until formal settlement has been reached. As section I.I.3 of the Audit Policy indicates, once settlement has been reached, EPA places a copy of the settlement agreement into the Audit Policy Docket. EPA also makes other documents related to the disclosure publicly available unless there is a valid reason for withholding them, such as if the information is confidential business information, if an exemption under the Freedom of Information Act applies, or if there is another Federal law that would prevent disclosure. EPA's policy on releasing information received under the Audit Policy is described in a January 16, 1997, memorandum from Steven A. Herman entitled, "Confidentiality of Information Received Under Agency's Self-Disclosure Policy." The memorandum is available on the Internet at [www.epa.gov/oeca/sahmemo.html](http://www.epa.gov/oeca/sahmemo.html).

**10. Clarify that Violations Discovered Pursuant to an Environmental Audit or Use of a CMS Performed as a Requirement of Participation in an Agency Partnership Program Can Be Considered to Have Been Discovered Voluntarily**

Section II.G.5 of the revised Audit Policy states that violations discovered pursuant to an environmental audit or compliance management system may be considered voluntary even if required for participation in an Agency partnership program, such as Project XL. One commenter objected to the EPA's maintaining discretion in this area, arguing that such discoveries should always be considered voluntary for purposes of the Audit Policy.

In many cases, such discoveries will be considered voluntary. However, depending upon the nature of the program and the circumstances under which an entity is participating, EPA reserves its discretion to determine that such discoveries are not voluntary.

**11. Note the Availability of Interpretive Guidance on Many Issues Concerning the Availability and the Application of the Policy**

Several commenters applauded EPA's efforts in this area but suggested that EPA could go even further by making interpretive guidance available on the Internet or other public channels.

For several years, interpretive guidance related to the Audit Policy has been available on the

Internet at [www.epa.gov/oeca/polguid/polguid1.html](http://www.epa.gov/oeca/polguid/polguid1.html). This site also includes an optional form that may be used to submit disclosures. As additional guidance is developed, it will be publicized in EPA's Audit Policy Updates and placed on the Internet site.

**12. Clarify that if a Facility Discloses to EPA a Violation in a Program that a State is Approved, Authorized or Delegated to Administer and Enforce, EPA Will Consult with the Applicable State in Responding to the Disclosure**

Four commenters asked for clarification on whether and how the Audit Policy applies when disclosures are made to States or when violations of Federal law occur under State-run programs.

Section I.G (Effect on States) has been revised to indicate that EPA will generally defer to State penalty mitigation for disclosures made under a State audit policy as long as the State policy meets minimum requirements for Federal delegation. Disclosures of violations of Federal programs that are State-run are eligible for Audit Policy credit and should be made to EPA at either the Regional or Headquarters level.

**B. OTHER COMMENTS**

**1. Small Business Policy**

In the May 17, 1999, *Federal Register* notice, EPA requested comments on whether the Audit Policy and the Small Business Policy should be combined or whether they should be maintained as two separate policies. (64 FR 26745, 26746, column 3). Of the commenters who addressed this question, one recommended that the two policies be combined and one recommended that the two policies be maintained separately.

The Audit Policy and the Small Business Policy have both been successful. Absent any compelling arguments for combining them, EPA has decided to keep the Audit Policy and the Small Business Policy as two separate incentive policies.

**2. Acquisitions**

The May 17, 1999, *Federal Register* notice solicited input as to how to encourage more companies to disclose and correct violations discovered in the acquisition context.

**a. Prompt disclosure** -- Three commenters suggested that the acquisition date should serve as the trigger for the prompt disclosure period for violations that were discovered as a result of pre-acquisition due diligence efforts.

EPA agrees that the prompt disclosure period should not begin prior to the acquisition date and so has added the following language to the explanatory text at section I.E.3: “The 21-day disclosure period will begin on the date of discovery by the acquiring entity, but in no case will the period begin earlier than the date of acquisition.”

**b. Repeat violations** -- One commenter suggested that the repeat violation condition should not apply in the event an acquisition has occurred following the previous violation.

EPA agrees that a violation that occurred prior to acquisition should not trigger the repeat violations exclusion. The explanatory text at I.E.7 states, “If a facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the ‘repeat violations’ exclusion.”

**c. Correction** -- Finally, two commenters stated that remediation could take longer following an acquisition, suggesting that EPA should waive the 60-day correction period in the event of an acquisition.

The Policy already includes a provision at II.D.5 indicating what procedures should be followed in the event an entity requires more than 60 days to correct the violation. Thus, EPA feels that no additional language regarding the correction period following acquisitions is warranted.

### **3. Repeat violations**

Seven commenters expressed opinions on the repeat violation condition of the Audit Policy, found in Section II.D.7. Four of these commenters asked for a clarification of the terms “closely related” and “repeat violation.” One objected to the repeat violations condition on the grounds that it is overly broad and unrealistic. One suggested that a violation should not be considered a repeat violation if it occurs in a separate corporate subsidiary, and that disclosure of a violation at a newly acquired facility should not be considered a repeat violation for the acquiring entity. And one indicated that EPA should reserve discretion on the repeat violation condition where minor violations are involved at the same or multiple facilities.

EPA has decided to retain the repeat violations exclusion. The “bright line” tests – 3 years for a single facility and 5 years for a pattern of violations at multiple facilities with a common owner or operator – have worked well and there is no indication that they should be changed. Once an entity has become aware of a violation, it should act to ensure that the same or similar violations do not recur in the future. The commenter’s suggestion to clarify the terms “closely related” and “repeat violation” is a helpful one, and in the future EPA may decide to issue interpretive guidance on these terms. Where the previous violation occurred prior to acquisition by a different company, however, the repeat violations exclusion will not apply. EPA also retains its discretion to allow penalty mitigation where the prior violations were minor ones.

#### **4. 60 Day Correction Period**

One commenter asked for clarification regarding when the 60-day correction period begins.

In response to this comment, EPA has revised Section II.D.5 of the Audit Policy to provide that the standard correction period runs 60 calendar days from the date of discovery.

#### **5. Audit Privilege and Immunity**

Several respondents commented that EPA should support audit privilege and immunity laws, and one commented that EPA should oppose them.

Issuance of the revised Audit Policy does not change EPA's position on audit privilege and immunity laws. The explanatory text in section II.F explains that EPA continues to oppose State audit privilege and immunity laws because they can shield evidence of wrongdoing, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know about potential and existing environmental hazards.

#### **6. Policy vs Regulation**

Two commenters addressed the issue of whether EPA should convert the Audit Policy into a regulation, with one commenter stating that it should become a regulation and one stating that it should not.

As noted in the *Federal Register* notice on May 17, 1999, EPA believes that there is ample evidence that the Policy has worked well and that a rulemaking is therefore unnecessary. (64 FR 26745, 26746). The revised Audit Policy remains a guidance document and does not represent final agency action. (See II.G.3)

#### **7. Supplemental Environmental Projects**

Two respondents mentioned the use of supplemental environmental projects (SEPs). One suggested that EPA should encourage the submission of a SEP as a way to compensate for deficiencies in meeting certain Policy conditions. The other mentioned that EPA should encourage the use of SEPs and suggested that a company that qualifies under the Policy should qualify for SEP use as part of its penalty package.

A SEP is an environmental project that an entity voluntarily agrees to perform as part of a settlement of an enforcement action. Examples of SEPs include projects to protect public health, projects to prevent or reduce pollution, and projects to improve the condition of the land, water or air in an area that has been damaged by the entity's violation. However, a regulated entity

cannot use a SEP as a means of returning to compliance. While EPA supports the use of SEPs in general, it does not view them as a substitute for meeting the conditions of the Audit Policy. For more information about SEPS, visit EPA's SEP homepage at [www.epa.gov/oeca/sep](http://www.epa.gov/oeca/sep).

## **8. Title V of the Clean Air Act**

Two commenters suggested that discoveries made through the Title V application process should be eligible for the Audit Policy, and two others asked for additional clarification regarding the scope and nature of an entity's Title V obligation to ascertain its compliance status.

On September 30, 1999, EPA issued guidance on the availability of the Audit Policy in the Title V context. (Memorandum from Eric Schaeffer, Director of the Office of Regulatory Enforcement, EPA, entitled "Reduced Penalties for Disclosures of Certain Clean Air Act Violations," available on the Internet at [www.epa.gov/oeca/polguid/polguid1.html](http://www.epa.gov/oeca/polguid/polguid1.html).) The guidance clarifies that certain Clean Air Act violations discovered, disclosed and corrected by a company prior to issuance of a Title V permit are potentially eligible for penalty mitigation under the Audit Policy. EPA may exercise its enforcement discretion in these cases to promote the Act's goals of thorough evaluation and full disclosure and correction of violations at the permit application stage.

## **9. Economic Benefit**

One commenter suggested that EPA should request comments on exercising its discretion to limit recovery of economic benefit and another commented that EPA should not automatically be entitled to recover economic benefit.

Recapturing a violator's economic benefit from noncompliance is the cornerstone of EPA's civil penalty program. Economic benefit can be captured in two ways: the economic savings that a company obtains from its failure to comply with the law (such as by failing to install required pollution prevention equipment) or as the illegal competitive advantage that a violator obtains by noncompliance (such as by selling a product before obtaining the necessary government approval). Many Federal statutes explicitly require EPA and the Federal courts to consider a violator's economic benefit in imposing a civil penalty. Included among these are the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, and the Emergency Planning and Community Right-to-Know Act. Given this statutory mandate, the revised Audit Policy retains EPA's full ability to recover significant economic benefit.

## **10. Legally Mandated Monitoring**

Several commenters questioned the utility of excluding violations that were discovered through legally mandated monitoring.

The purpose of the Audit Policy is to encourage greater compliance with laws that protect public health and the environment by encouraging a higher standard of self-policing. One way to self-police is to undertake voluntary and systematic efforts to discover compliance problems. In order to be eligible for penalty mitigation under the Audit Policy, the violation must have been discovered voluntarily. If the violation was discovered through legally mandated monitoring, it was not discovered through the voluntary self-policing promoted by the Audit Policy and is thus ineligible for penalty mitigation under the Audit Policy.